No. 95-1790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 204, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Petitioners,

v.

LUNDY PACKING COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 95-1364

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Intervenors,

v.

LUNDY PACKING COMPANY,
Respondent.

Argued Sept. 28, 1995.

Decided Nov. 3, 1995.

Before WILKINSON, NIEMEYER, and HAMILTON, Circuit Judges.

Enforcement denied by published opinion. Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge HAMILTON joined.

OPINION

WILKINSON, Circuit Judge:

The National Labor Relations Board ("Board") seeks enforcement of its bargaining order against Lundy Packing Company, Inc. ("Lundy"). The principal basis for

Lundy's refusal to bargain is its contention that the Board improperly excluded certain quality control employees from a production and maintenance bargaining unit. We agree. The Board's bargaining unit determination both contravened its own announced standards and accorded controlling weight to the extent of union organization at Lundy, thereby violating § 9(c)(5) of the National Labor Relations Act. Accordingly, we deny the Board's petition for enforcement.

I.

Lundy operates a pork products plant in Clinton, North Carolina, which employs approximately 880 workers. On March 23, 1993, the United Food and Commercial Workers Union and the International Union of Operating Engineers filed a petition to jointly represent a group ("unit") of production and maintenance ("P & M") employees at Lundy's Clinton facility. Prior to this attempt, there was no history of bargaining here.

The composition of a bargaining unit is significant. Before a union can be certified as the representative of an employee unit, a majority of the unit's employees must vote for union representation. The predilections of employees are often revealed during early organizational efforts, and the inclusion or exclusion of certain employees may thus determine which party will prevail in a subsequent election. *See 1 The Developing Labor Law*, 378-80, 448 (Patrick Hardin, et al., eds., 3d ed.1992).

Here, Lundy and the Unions disagreed over the unit's composition. Lundy contended that a "wall-to-wall" unit (including all employees) was appropriate. The Unions' proposal, meanwhile, excluded approximately 213 employees, among them: drivers, waste management operators, garage employees, office clerical employees, process sales coordinators, hog buyers, quality control employees, and industrial engineers. Following a hearing, on May 7, 1993, the Acting Regional Director approved with some

additions the Unions' proposal for a less inclusive unit. On appeal, the Board directed that challenged ballots be cast by some of the excluded employees, including the electrician, the receiver, the industrial engineers ("IEs"), and the quality control employees (quality assurance/lab technicians and temporary management trainees ("QA/LTs") and lab technicians ("LTs")).

The election was held on June 3, 1993, with the Unions prevailing on a 318 to 309 vote (absent the 24 challenged and sealed ballots). After an investigation of the challenged ballots, the Regional Director ordered the opening and counting of the nine ballots cast by quality control employees, the three ballots cast by industrial engineers, and the two ballots cast by the waste management operator and receiver. The record does not reveal how the challenged votes might have affected the election outcome.

The Unions appealed this ruling to the Board. On September 2, 1994, the Board in a divided decision reversed the Regional Director, ordering that the challenged ballots for the QA/LTs, LTs, and IEs be disposed of and the Unions certified. Lundy subsequently refused to bargain with the Unions, precipitating an unfair labor charge and this appeal.

II.

Section 9(b) of the National Labor Relations Act grants to the Board the power to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). We are mindful that the Board possesses broad discretion in determining the appropriate unit. *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir.1978). The Board's discretion reflects both its acknowledged expertise in such matters and its need for " 'flexibility in shaping the [bargaining] unit to the particular case.' " *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494, 105 S.Ct. 984, 987, 83 L.Ed.2d 986 (1985),

quoting NLRB v. Hearst Publications, Inc., 322 U.S. 111, 134, 64 S.Ct. 851, 862, 88 L.Ed. 1170 (1944).

Nonetheless, the Board must operate within statutory parameters. Section 9(c)(5) of the National Labor Relations Act states: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159 (c)(5). This provision came in response to several Board "decisions where the unit determined could only be supported on the basis of the extent of organization." *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 441, 85 S.Ct. 1061, 1063, 13 L.Ed.2d 951 (1965). While the operative concept "extent of organization" is not defined in the statute, it refers generally to "the groups of employees on which the union has focused its organizing efforts." 1 *The Developing Labor Law* at 452. Moreover, § 9(c)(5) does not merely preclude the Board from relying "only" on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or "controlling" weight. *See Arcadian Shores*, 580 F.2d at 120 (section 9(c)(5) prohibits "the extent of union organization [from being] the *dominant* factor in the Board's determination of the bargaining unit").

Heretofore the Board has generally avoided § 9(c)(5) violations by applying a multifactor analysis that was sufficiently independent of the extent of union organization—the so-called "community of interest" test. Several criteria, no one of which was more dominant than another, would determine whether employees shared a community of interest sufficient to form an appropriate unit:

> (1) similarity in the scale and manner of determining the earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills, and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

I.T.O. Corp. of Baltimore v. NLRB, 818 F.2d 1108, 1113 (4th Cir.1987), *quoting* R. Gorman, *Labor Law: Unionization and Collective Bargaining* 69 (1976).

Under this traditional method of analysis, the excluded quality control employees at Lundy appear to qualify for inclusion in the appropriate bargaining unit. The QA/LTs performed functions that were integral to the production process. In fact, they spent approximately 80 percent of their time on the production floor where they tested the cleanliness of the facility, obtained temperatures of hogs and products, and otherwise inspected the production line. The remaining 20 percent of their time was consumed in an office recording the results of their testing. The LTs spent about 15 percent of their time taking samples and 85 percent of their time performing tests in a laboratory. All these employees shared a great deal with the production and maintenance employees who were included in the Unions' proposed unit: (1) comparable wages; (2) identical benefits; (3) the performance of tasks essential to the production process; (4) similar educational backgrounds; (5) interaction on the production floor; (6) close physical proximity; (7) the same cafeteria, parking lot, break rooms, and locker room; and (8) similar performance evaluations.

The excluded quality control employees did differ in a few respects: (1) the method for calculating their earnings; (2) supervision; and (3) a lack of interchangeability with other P & M positions (other P & M employees did not perform the work of quality control

employees in their absence). Such differences, however, were not unique to the quality control employees. At least one P & M employee who was included in the bargaining unit had his pay calculated in the same manner as the excluded quality control employees, and dozens of other employees with different supervisors were included within the bargaining unit. The exclusion of quality control employees based on such meager differences is, to say the least, problematic under the "community of interest" standard, when such employees were engaged in tasks essential to the company's meat packing and processing operation.[1]

The Board, however, adopted a novel legal standard which effectively accomplished the exclusion. Under this new standard, any union-proposed unit is presumed appropriate unless an "overwhelming community of interest" exists between the excluded employees and the union-proposed unit: "Here, [the Board] find[s] . . . that the technicians do not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners' objections." *Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042, 1043, 1994 WL 481361 (1994). By presuming the union-proposed unit

[1] While the industrial engineers ("IEs") were not as numerous, we agree with the dissenting Member, *see Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042, 1046, 1994 WL 481361 (1994) (Member Stephens, dissenting), and the Regional Director that the IEs shared a community of interest with other P & M unit personnel. The IEs studied the efficiency of the production process, spending 50 percent of their time working on the production floor with P & M employees to reduce production costs. The IEs routinely spoke with P & M employees while performing their duties, had the same benefits and holidays, earned comparable wages, occasionally performed the work of other P & M employees, and had to meet no particular educational requirements. Further, there was no evidence that the basis for promotion was any different for IEs than for other P & M employees. Accordingly, it was error for the Board to exclude them from the P & M unit.

proper unless there is "an overwhelming community of interest" with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because "the union will propose the unit it has organized." *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir.1991); *see Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir.1984) ("the fact that [] the union wanted a smaller unit . . . could not justify the Board's certifying such a unit if it were otherwise inappropriate"). Given the community of interest between the included and excluded employees here, it is impossible to escape the conclusion that the QA/LTs' ballots were excluded "in large part because the Petitioners do not seek to represent them." *Lundy Packing*, 314 N.L.R.B. at 1046 (Member Stephens, dissenting). In fact, the Board has as much as admitted that it gave controlling weight to the Unions' proposal: "[A] unit including [quality control] employees might also have been an appropriate unit had such a unit been sought by the Petitioners." *Lundy Packing*, 314 N.L.R.B. at 1044.[2]

The Board's ruling thus exhibits the indicia of a classic § 9(c)(5) violation. The cases offered by the Board to support its holding, *Penn Color, Inc.*, 249 N.L.R.B. 1117, 1980 WL 11466 (1980), and *Beatrice Foods*, 222 N.L.R.B. 883, 1976 WL 7806 (1976), do not adopt or even reference the "overwhelming interest" test. Instead, it appears that the Board imported the "overwhelming interest" test from an entirely different area of labor law,

[2] While the Board points to the fact that the Acting Regional Director, early in this case, enlarged the unit beyond the Unions' initial request, we find this inapposite because the Unions did not appeal these early classifications to the Board. The sole question before the court is whether the Board gave controlling weight to union organization with regard to the exclusion of the QA/LTs, LTs, and IEs. The Acting Regional Director's determinations regarding *different* employees in no way insulated the Board from subsequent statutory violations when it decided whether an appropriate unit included the QA/LTs, LTs, and IEs.

accretion cases. In accretion cases, however, new employees are added to an existing bargaining unit *without* a representation election; therefore, the showing of shared characteristics must be higher to protect employee interests. *See, e.g., Westvaco, Va., Folding Box Div. v. NLRB*, 795 F.2d 1171, 1173 (4th Cir.1986). In accretion cases, the Board has indeed explained that new employees can be added to an existing bargaining unit "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an *overwhelming community of interest* with the preexisting unit to which they are accreted." *Safeway Stores, Inc.*, 256 N.L.R.B. 918, 1981 WL 20532 (1981) (emphasis added). But this was not an accretion case, and the Board's transposition of the "overwhelming interest" standard runs afoul of § 9(c)(5).

III.

The statutory infirmity of the Board's holding is underscored when the Board's prior treatment of quality control personnel is examined. Heretofore, in an effort to avoid workplace fragmentation, the Board has consistently included quality control personnel in P & M units. *Bennett Industries, Inc.*, 313 N.L.R.B. 1363, 1364, 1994 WL 673754 (1994) (quality control employees included within P & M unit by Regional Director because they "perform a function which is an extension of and integrated with the manufacturing process and work in close proximity to undisputed unit employees"); *Virginia Mfg. Co., Inc.*, 311 N.L.R.B. 992, 994, 1993 WL 193727 (1993) (quality control employee included within P & M unit because he spent 20 percent of his time on the production floor and had contact with unit employees); *Hogan Mfg., Inc.*, 305 N.L.R.B. 806, 807, 1991 WL 263214 (1991) (quality control employee included within P & M unit because "quality control is a vital part of the production process"); *Blue Grass Industries, Inc.*,

287 N.L.R.B. 274, 299, 1987 WL 90121 (1987) (quality control employees included within P & M unit because they are an "integral part of the overall manufacturing process"); *SCM Corp.*, 270 N.L.R.B. 885, 886, 1984 WL 36459 (1984) (quality control employee included within P & M unit because he receives comparable benefits and has "regular work-related contact with other unit employees"); *Libbey Glass Division*, 211 N.L.R.B. 939, 941, 1974 WL 5114 (1974) (quality control employees included within P & M unit because "it is clear these employees have substantial contact with production and maintenance employees in performing their inspection functions, and their duties are an integral part of the Employer's overall glass manufacturing process"); *Ambrosia Chocolate*, 202 N.L.R.B. 788, 789, 1973 WL 12216 (1973) (quality control employees included within P & M unit because they share the same lunchroom, locker room, parking lot, holidays, and benefits, thereby creating "sufficient common interests").

The Board's rationale thus seemed clear: quality control employees were integrally related to the production process and typically shared important characteristics with other P & M employees. Indeed, P & M unit representation of quality control employees appeared to be routine. The Board had included quality control workers in P & M units under quite divergent circumstances: (1) cases in which the union sought to exclude all quality control personnel, *see, e.g., Ambrosia Chocolate*, 202 N.L.R.B. at 788; (2) cases in which the union sought to include all quality control personnel, *see, e.g., Libbey Glass Division*, 211 N.L.R.B. at 939; and (3) cases in which a party sought to exclude some quality control employees from a unit that represented other quality control personnel, *see, e.g., Virginia Mfg.*, 311 N.L.R.B. at 994. Even the United Food and Commercial Workers International Union, one of the unions objecting to the inclusion of quality control employees here, represents quality control workers at another North Carolina food plant, Equity Group.

The Board can point to only two cases in which quality control employees were excluded from a P & M unit, and both are easily distinguishable. In *Penn Color,* 249 N.L.R.B. at 1120, quality control employees had a different basis for promotion, different educational requirements, and there was no evidence of substantial contract with other P & M employees. Quality control personnel were similarly isolated in *Beatrice Foods,* 222 N.L.R.B. 883, 1976 WL 7806 (1976), where they worked in a laboratory and did not have regular contract with other P & M employees. At Lundy, in contrast, quality control employees often worked on the production floor, shared a similar basis for the evaluation of their work, had regular contact with other P & M employees, and faced no special academic requirements. In short, Lundy's quality control employees were integrated into the production process, while those at Penn Color and Beatrice Foods were not.

Whatever the Board's chosen criteria for decision, they must be applied consistently. "[W]hen the Board adopts a policy to guide it in the exercise of its discretion, the original very broad discretion is to some extent narrowed, and subsequent decisions must be reasonably consistent with the expressed policy." *Westvaco,* 795 F.2d at 1173, *quoting Consolidated Papers, Inc. v. NLRB,* 670 F.2d 754, 757 (7th Cir.1982). Courts have insisted "that the Board apply with reasonable consistency whatever standard it adopts to guide the exercise of its delegated power." *Continental Web Press,* 742 F.2d at 1089. While the Board may choose to "depart from established policy, it must explicitly announce the change and its reasons for the change." *Westvaco,* 795 F.2d at 1173, *quoting Consolidated Papers,* 670 F.2d at 757. In *Continental Web Press,* for example, the Board had deviated from a policy of including certain employees in a bargaining unit without explaining "why a unit that it had again and again found to be homogenous should be broken into subunits." 742 F.2d at 1094.

The court denied enforcement, explaining that while "[t]he Board is allowed to reverse course . . . it has got to give reasons, or else the reversal is arbitrary." *Id.* at 1093 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Here, the Board gave insufficient reasons for its change of course and switch of standards.

We recognize that bargaining unit cases are fact-sensitive and that decisional law will seldom travel a straight-line course. Nonetheless, the significance of neutral rationales for inclusion or exclusion of particular employees in collective bargaining units cannot be overstated. Otherwise, reviewing courts will have no means of enforcing § 9(c)(5)'s prohibition; the Board can selectively rely on differences when the union desires exclusion of employees—and on similarities when the union desires inclusion. *See* Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review,* 75 B.U.L.Rev. 387 (1995). The deference owed the Board as the primary guardian of the bargaining process is well established. It will not extend, however, to the point where the boundaries of the Act are plainly breached.

IV.

We do not reach respondent's other assignments of error. For the foregoing reasons, we deny enforcement of the Board's order.

ENFORCEMENT DENIED.

APPENDIX B

[Filed January 2, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364
12-CA-16618

NATIONAL LABOR RELATIONS BOARD;
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, Local 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 465, AFL-CIO,
Intervenors,

v.

LUNDY PACKING COMPANY,
Respondent.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The intervenors' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

Filed January 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364
12-CA-16618

NLRB

v.

LUNDY PACKING CO.

MANDATE

The judgment of this Court dated 11/3/95 takes effect today.

BERT M. MONTAGUE
Clerk

APPENDIX D

Clinton, NC

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-CA-16618
(Formerly 11-CA-16222)

THE LUNDY PACKING COMPANY, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO

ORDER REMANDING PROCEEDING TO REGIONAL DIRECTOR

On December 30, 1994, the National Labor Relations Board issued a Decision and Order[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered that Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, the Board sought enforcement of its bargaining order with the United States Court of Appeals

[1] 310 NLRB No. 1959 (1994). Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570 by reference to volume and pamphlet number.

for the Fourth Circuit. On November 3, 1995, the court denied enforcement of the Board's order on the ground that the certified unit was not appropriate. On January 2, 1996, the court denied the Intervenors' petition for rehearing with suggestion for rehearing in banc.

The Board, having reviewed the record in light of the court's opinion, finds it necessary to remand the proceeding to the Regional Director to dispose of the challenged ballots in the related representation proceeding, Case 12-RC-7606. Accordingly,

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 12 for further appropriate action.

Dated, Washington, D.C., February 6, 1996.

By direction of the Board:

ENID W. WEBER
Associate Executive Secretary

APPENDIX E

[NLRB Logo]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

FEBRUARY 9, 1996

THE LUNDY PACKING COMPANY, INC., CASE 12-CA-16618.

RESPONDENT'S MOTION FOR STAY OF THE BOARD'S FEBRUARY 6, 1996 ORDER REMANDING THE PROCEEDING TO THE REGIONAL DIRECTOR TO DISPOSE OF THE CHALLENGED BALLOTS IN CASE 12-RC-7606 IS DENIED. ALTHOUGH THE BOARD'S ORDER INDICATED THAT THE BOARD WAS REMANDING THE REFUSAL-TO-BARGAIN PROCEEDING IN CASE 12-CA-16618 TO THE REGIONAL DIRECTOR, RATHER THAN THE UNDERLYING REPRESENTATION PROCEEDING IN CASE 12-RC-7606, THIS WAS INADVERTENT. A CORRECTED ORDER IS BEING ISSUED THIS SAME DATE. THE BOARD HAS ACCEPTED THE COURT'S DENIAL OF ENFORCEMENT OF THE BOARD'S BARGAINING ORDER IN CASE 12-CA-16618. THE BOARD RETAINS JURISDICTION, HOWEVER, IN THE REPRESENTATION CASE AND IT IS THAT PROCEEDING WHICH THE BOARD HAS REMANDED TO THE REGIONAL DIRECTOR FOR FURTHER APPROPRIATE ACTION. BY DIRECTION OF THE BOARD:

JOHN J. TONER
Executive Secretary

cc: NLRB—Region 12
Robert A. Valois, Esq.
Peter J. Ford, Esq.
Richard F. Griffin, Jr., Esq.

Clinton, NC

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC.

and

UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO

ORDER REMANDING PROCEEDING TO REGIONAL DIRECTOR

On December 30, 1994, the National Labor Relations Board issued a Decision and Order in Case 12-CA-16618[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordered that Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices.

Thereafter, the Board sought enforcement of its bargaining order with the United States Court of Appeals for the Fourth Circuit. On November 3, 1995, the court denied enforcement of the Board's order on the ground that the certified unit was not appropriate. On January

[1] 310 NLRB No. 1959 (1994). Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570 by reference to volume and pamphlet number.

2, 1996, the court denied the Intervenors' petition for rehearing with suggestion for rehearing in banc.

The Board, having reviewed the record in light of the court's opinion, finds it necessary to remand the representation proceeding to the Regional Director to dispose of the challenged ballots in Case 12-RC-7606.

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 12 for further appropriate action.

Dated, Washington, D.C., February 6, 1996.

By direction of the Board:

ENID W. WEBER
Associate Executive Secretary

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 12

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC.,
Employer

and

UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 204, AFL-CIO and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Joint Petitioners

ORDER DIRECTING OPENING OF CHALLENGED BALLOTS AND ISSUANCE OF REVISED TALLY OF BALLOTS

On November 3, 1995, the United States Court of Appeals for the Fourth Circuit denied enforcement of the National Labor Relations Board's Decision and Order in Case 12-CA-16618 (formerly 11-CA-16222)—315 NLRB No. 159 (1994), on the ground that the Board had improperly reversed the former Regional Director's determination as to certain challenged ballots in the related representation proceeding, Case 12-RC-7606. Thereafter, the Board, by its Associate Executive Secretary, on February 6, 1996, issued an Order Remanding Proceeding to Regional Director, and on February 9, 1996, issued a Corrected Order, for the purpose of disposing of the challenged ballots in the aforementioned representation proceeding.

Consistent with the Court's opinion, the job classifications of quality assurance/lab technicians, temporary management trainees I, lab technicians, industrial engineers, and industrial engineer trainees, are to be included in the appropriate bargaining unit. Thus, in accordance with the former Regional Director's determination, the ballots of Sandy Hall, Ronnie Johnson, Kenneth Parker, Karen Autry, Jimmy Tyndall, Leroy Wooten, Emily Brunson, Carlton Honeycutt, Louise Preddy, Sharon Williams, Relmon Fann, and Aundria Grady shall be opened and counted. In addition, the job classifications of finished product loader/cleaner and waste management operator having been previously found to be appropriately included in the bargaining unit, and no issue thereon having been raised before the Court, the challenges to the ballots of Charles Carter and Lynwood E. Stanley shall be opened and counted, in accordance with the former Regional Director's determination.

ACCORDINGLY, IT IS HEREBY DIRECTED that the challenged ballots cast by *Sandy Hall, Ronnie Johnson, Kenneth Parker, Karen Autry, Jimmy Tyndall, Leroy Wooten, Emily Brunson, Carlton Honeycutt, Louise Preddy, Sharon Williams, Relmon Fann, Aundria Grady, Charles Carter,* and *Lynwood E. Stanley* be opened and counted, and a revised tally of ballots issued in accordance with the results shown.

THEREFORE, PLEASE TAKE NOTICE that on the 16th day of February, 1996, at 11:00 a.m. in the National Labor Relations Board Hearing Room, 201 E. Kennedy Boulevard, Suite 530, Tampa, Florida, the aforementioned challenged ballots will be opened and counted by a designated Board agent, at which time each party shall have the right to be present.[1]

[1] This Order is limited to the challenged ballots covered herein and is not to be read as dealing with and/or disposing of the remaining challenged ballots covered in the former Regional Director's Supplemental Decision. Any necessary and appropriate action concerning these remaining challenged ballots is reserved for a time following the count directed herein. Thus, the revised tally will reflect that said 10 challenged ballots are still pending disposition.

DATED at Tampa, Florida this 9th day of February, 1996.

/s/ Rochelle Kentov
ROCHELLE KENTOV
Regional Director
National Labor Relations Board
Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, FL 33602-5824

APPENDIX G

Filed: February 15, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364
(12-CA-16618)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Intervenors,

versus

LUNDY PACKING COMPANY,
Respondent.

No. 96-1177
12-CA-16618

IN RE: LUNDY PACKING COMPANY, INCORPORATED,
Petitioner.

ORDER

In *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court addressed the Board's bargaining unit determination for a production and maintenance unit at Lundy Packing Company's Clinton, North Carolina facility. In that case, we denied the Board's request to enforce its bargaining order against Lundy, thereby terminating all administrative proceedings relating to the case. At no time did the Board ever suggest that a remand for counting the challenged ballots would be an appropriate alternative disposition of the case (the Board unequivocally requested "that judgment should enter enforcing the Board's order in full"), nor, given our view of the proceedings below, did this court remand any portion of the case to the Board for further consideration.

"Absent a remand, the Board may neither reopen nor make additional rulings on a case once exclusive jurisdiction vests in the reviewing court." *George Banta Co., Inc. v. N.L.R.B.*, 686 F.2d 10, 16 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). This is because "[i]n section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), Congress provided that '[u]pon the filing of the record with [the Court of Appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final.'" *Service Emp. Intern. Union Local 250, AFL-CIO v. N.L.R.B.*, 640 F.2d 1042, 1044 (9th Cir. 1981) (Kennedy, J.). As the Supreme Court has noted, when a "proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act . . . . [i]t is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases." *Int'l Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339 (1945).

In *Lundy*, this court addressed both the refusal of Lundy Packing to bargain and the underlying representation proceedings. Indeed, the refusal to bargain case was

merely the vehicle by which the Board's representation proceedings reached this court for review. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964) ("Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit"); *The Developing Labor Law* at 1878 (Hardin, ed. 1992) ("review of issues in representation proceedings may only be obtained incidental to review of an order entered in an unfair labor practice proceeding"). The Board acknowledged as much in its *Lundy* brief, listing only two "determinative underlying issues": "(1) whether the Board abused its broad discretion in finding appropriate a production and maintenance unit . . . and (2) whether the Board abused its discretion in overruling the Company's election objections."

Thus, the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction. Following our decision in *Lundy*, "[t]he Board had no jurisdiction to modify the remedy." *W.L. Miller Co. v. N.L.R.B.*, 988 F.2d 834, 837 (8th Cir. 1993). Indeed, any other approach would result in endless rounds of piecemeal litigation and frustrate the ability of the Supreme Court to review final decisions of this court.

Our respect for the Board is such that we see no need to mandamus or otherwise enjoin it. Therefore, Lundy's motion to stay the Board's order is moot, its motion for a writ of mandamus is denied, its motion to show cause why the Board should not be held in contempt is denied, and the unions' motion to intervene is granted. We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects.

Entered at the direction of Chief Judge Wilkinson with the concurrence of Judge Niemeyer and Judge Hamilton.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX H

FILED: March 21, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1364(L)
(12-CA-16618)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 204, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
Intervenors,

versus

LUNDY PACKING COMPANY,
Respondent.

No. 96-1177
12-CA-16618

IN RE: LUNDY PACKING COMPANY, INCORPORATED,
Petitioner.

ORDER

Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright*, disposing of the petition on the basis of the Board's improper bargaining unit determination.

While the Board contends that our decision constituted some sort of remand, nowhere in our opinion did we so indicate. Moreover, given that the Board did not request or even suggest a remand in its initial submissions to this court, it is unusual that the Board would have interpreted our disposition as implicitly providing such a remedy. And if the Board possessed legitimate questions about the outcome of this case, those questions should have been raised in a timely petition for rehearing. Yet the Board did not file such a petition for rehearing.

When the Board makes a timely request for a remand to count disputed ballots, it enables the court to inquire in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay. *See N.L.R.B. v. Long Island College Hospital*, 20 F.3d 76, 83 (2nd Cir. 1994) ("Because of the great delay, the extraordinary Board and employee turnover . . . and the fact that the majority of the present employees did not vote in the relevant election, this case presents unique circumstances that warrant denial of enforcement of the bargaining order"). Instead, the Board acted in clear contravention of its jurisdictional limits and sought to bypass this court. While the Board calls our attention to an order issued in *BB&L, Inc. v. N.L.R.B.* (93-1479) (D.C. Cir. 1995), there, the Board

requested a remand in a timely petition for rehearing, and the court saw fit to enter an order prescribing that a particular ballot be counted. Hence, the Board's actions in *BB&L, Inc.* were pursuant to a properly obtained court order. Here, in contrast, the Board did not even request a remand and simply proceeded to conduct further proceedings on its own initiative. As we explained in our order of February 15, 1996, the Board had no such authority.

The court reiterates its respect for the Board's role in the area of national labor relations law. The court expects in turn respect for the its [*sic*] process and its mandates. The court denies the motion for reconsideration of its order of February 15.

Entered at the direction of Chief Judge Wilkinson, with the concurrence of Judge Niemeyer and Judge Hamilton.

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX I

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-CA-16618
(formerly 11-CA-16222)

THE LUNDY PACKING COMPANY, INC. and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO

December 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND
MEMBERS STEPHENS AND TRUESDALE

On October 19, 1994, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the request of the United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO (the Unions) to bargain following the Unions' certification in Case 12-RC-7606. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 14, 1994, the General Counsel filed a Motion for Summary Judgment. On November 17, 1994, the Board issued an order transferring the proceeding to

the Board and a Notice to Show Cause why the motion should not be granted. On December 14, 1994, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and its response to the notice to show cause, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election, the Board's unit determination, the failure of the Board to dismiss the petition for a lack of showing of interest, the excessive turnover in the bargaining unit during the period of time prior to the issuance of the Board's decision, and for all of the other reasons advanced during the underlying representation proceeding in Case 12-RC-7606.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, The Lundy Packing Company, Inc., a North Carolina corporation, with an office and place of business in Clinton, North Carolina, has been engaged in

the processing and sale of pork and pork products. During the 12 months preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received at its Clinton, North Carolina facility goods valued in excess of $50,000 directly from points located outside the State of North Carolina. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held June 3, 1993, the Unions were certified on September 2, 1994,[3] as the collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handler/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by the Employer at its Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process

[3] 314 NLRB 1042.

sales coordinators, trip audit entry section leaders, office clericals, confidential employees, guards and supervisors as defined in the Act.

The Unions continue to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since September 7, 1994, the Unions have requested the Respondent to bargain, and, since September 7, 1994, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 7, 1994, to bargain with the Unions as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Unions, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Unions. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, The Lundy Packing Company, Inc., Clinton, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO, as the exclusive bargaining representative of the employees in the following bargaining unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handlers/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by the Employer at its Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process sales coordinators, trip audit entry section leaders, office clericals, confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Unions as the exclusive representative of the employees in the unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Clinton, North Carolina, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 30, 1994

William B. Gould IV,	Chairman
James M. Stephens,	Member
John C. Truesdale,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO as the exclusive representative of the employees in the following bargaining unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handler/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by us at our Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process sales coordinators, trip audit entry section leaders, office clericals, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Unions and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

THE LUNDY PACKING COMPANY, INC.

APPENDIX J

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC. and UNITED FOOD AND COMMERICAL WORKERS UNION, LOCAL 204, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Joint Petitioners.

September 2, 1994

DECISION ON REVIEW, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND
MEMBERS STEPHENS AND DEVANEY

On May 7, 1993, the Acting Regional Director for Region 12 issued a Decision and Direction of Election in which he directed an election in the petitioned-for unit of production and maintenance employees, excluding, inter alia, quality assurance/lab technicians and management trainees I, lab technicians, and industrial engineers. The Joint Petitioners and the Employer filed timely requests for review. By Order dated June 3, 1993, the Board majority [1] denied both requests for review but permitted the electrician A at the Employer's Gold Banner facility, the receiver, industrial engineers, quality assurance/lab technicians, temporary management trainees I, and lab tech-

[1] Then-Chairman Stephens and Member Devaney; former-Member Raudabaugh dissenting in part on other grounds.

nicians to vote by challenged ballot. The election was conducted on June 3, 1993; the tally of ballots showed 318 votes for Joint Petitioner and 309 against, with 24 determinative challenged ballots. Thereafter, the Employer filed timely objections to the election.

On July 29, 1993, after an investigation, the Regional Director issued a Supplemental Decision on Challenged Ballots and Objections to Election, and Order. The Regional Director overruled the challenges to the ballots cast by the quality assurance/lab technicians, temporary management trainees I, lab technicians, industrial engineers, waste management operator, and receiver, and included them in the unit.[2] The Joint Petitioners filed a timely request for review of the Regional Director's decision, arguing that these classifications should be excluded from the unit. The Employer filed a statement in opposition to the Joint Petitioners' request for review, and a motion to strike the request for review.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record,[4] we have decided to: (1) grant Joint Petitioners' request for review with respect to the Regional Director's finding that the petitioned-for unit of production and maintenance employees also must include the quality assurance/lab technicians, temporary management trainees I, lab technicians, and industrial engineers and, on review, reverse

[2] The Regional Director also overruled challenges to the ballots cast by the finished product loader/cleaner, and sustained challenges to the ballots of the electrician A and employees McPhail, Valente, and Bradshaw. He further directed that the eligibility of certain alleged discriminatees be determined in the pending unfair labor practice proceeding. No request for review was filed with regard to these rulings.

[3] The Employer's motion to strike is denied.

[4] See Sec. 102.67(d) of the Board's Rules (the Board may, in its discretion, examine the record in evaluating a request for review).

the Regional Director's decision overruling the challenges to their ballots; (2) deny the Joint Petitioners' request for review of the Regional Director's decision overruling the challenge to the ballot of the waste management operator and deny the Employer's request for review of the Regional Director's overruling of the Employer's objections to the election for the reasons stated in his supplemental decision; and (3) find it unnecessary to resolve the challenge to the ballot cast by the receiver because, in view of the above determinations, his ballot no longer is determinative of the election results.

The Employer is engaged in the processing and sale of pork and pork products at its Clinton, North Carolina facility. The Employer's facility consists of two plants: the first contains the processing and shipping areas; the second contains the kill and cut areas. The two plants are connected via a tunnel where the pork products from plant two are conveyed to plant one for further processing and shipment. A hog barn, where hogs are housed for slaughter, adjoins plant two. A separate garage building is physically located between the two plant buildings, and the waste water treatment plant and warehouse are located behind the hog barn. All employees enjoy the same benefits and all are subject to drug testing and to the Employer's rules and employee handbook. There are no specific plantwide shifts; each department sets it own shifts.

Placement of the Quality Assurance/Lab Technicians, Temporary Management Trainees I, Lab Technicians, and Management Trainees

Quality assurance/lab technicians and temporary management trainees I spend approximately 80 percent of their time on the production floor taking a variety of samples of the working surfaces to which the product will be exposed, testing the housekeeping and cleanliness of the facility, performing inspections, and obtaining weights and temperature of hogs and products. The remaining 20

percent of their time is spent recording the results of their inspections in the office. Lab technicians (a classification separate from that of quality assurance/lab technicians) spend approximately 85 percent of their time in the laboratory doing tests, and the remainder working around the production areas gathering samples. They also prepare paperwork documenting test results. Production and maintenance employees perform the same type of checks on meat as do the quality assurance/lab technicians, temporary management trainees I, and lab technicians; all fill out the same reports.

Quality assurance/lab technicians, temporary management trainees I, and lab technicians (collectively referred to as technicians) are paid on a coefficient basis, which is not an hourly basis, and record their time on a timesheet. In contrast, production and maintenance employees are hourly paid and punch a timeclock. Technicians do not interchange with production and maintenance employees. Technicians are supervised by the quality assurance/lab manager, under the direction of the research and development director. With respect to transfers, five of the seven current quality assurance/lab technicians and temporary management trainees I transferred directly from production positions, and one transferred from an office position. Technicians are not required to have a college education or technical education. Employees take a math or aptitude test when transferring to a quality-control position. Four employees stated that when they transferred from production to quality assurance/lab technician positions, they received 6 months of on-the-job training. The lab technicians had been assigned to clerical positions before being placed in the lab technician classification; one has an associate degree in accounting, and the other has no education beyond high school. Lab technicians receive several weeks of on-the-job training. Quality assurance/lab technicians and temporary management trainees I are cross-trained and substitute for lab technicians when the lab technicians are absent.

A petitioned-for unit need only be *an* appropriate unit for purposes of collective bargaining, not the most appropriate unit,[5] and in representation proceedings, the unit sought by the petitioner is always a relevant consideration.[6] Here, we find, contrary to the Regional Director, that the technicians do not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners' objections. The technicians are separately supervised, are paid differently than the petitioned-for employees, and interchange with each other but not with production and maintenance employees. Although technicians do perform some of the same function as performed by the petitioned-for employees, the majority of their functions, albeit related to the production process, are generally different from those performed by production and maintenance employees. In addition, although there is some contact between technicians and the petitioned-for employees, this contact is not so substantial and regular as to compel their inclusion in the unit.

In *Penn Color*,[7] the Board found appropriate the petitioned-for unit of production and maintenance employees, excluding quality control and development technicians. There, despite common vacation policies, holidays, pension plans, sick days, and "some" contact, the Board found that in view of the their separate supervision, absence of interchange, option of being paid on a salaried basis, and different requirements regarding educational background and on-the-job training, as well as the fact that the petitioner did not seek to include them in the unit, the quality control and research and development technicians' community of interest with production and maintenance employees was not sufficient to warrant

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[5] *Omni International Hotel*, 283 NLRB 475 (1987).

[6] *E. H. Koester Bakery & Co.*, 136 NLRB 1006 (1962).

[7] 249 NLRB 1117 (1980).

including them in the unit. In *Beatrice Foods,*[8] the Board sustained challenges to the ballots of quality control employees, despite the petitioner's urgings that those ballots be counted. The Board found that as they were separately supervised, separately located, and did not have regular contact with production employees, quality control employees did not share a sufficient community of interest with unit employees to enable them to be included in the unit.[9]

We are not unmindful that the Board has generally included quality control employees in production and maintenance units when a union has requested them, finding that their placement in the same unit does not create a conflict of interest.[10] Here, there are factors

[8] 222 NLRB 883 (1976).

[9] *Kellogg Switchboard & Supply Co.*, 127 NLRB 64 (1960), and *W. R. Grace & Co.*, 202 NLRB 788 (1973), in which the Board included quality control employees over the petitioners' objections, were decided prior to the Board's decision in *Penn Color* and, therefore, have diminished precedential value. Moreover, both cases are distinguishable. In *Kellogg*, the Board simply concluded, with almost no explication, that the interests of the sole quality control technician were not sufficiently dissimilar from those of production and maintenance employees to justify his exclusion. In *W. R. Grace & Co.*, the Board overruled challenges to the ballots of quality control employees in view of their numerous contacts with unit employees and their integral role in the production process, and the fact that they were hourly paid, shared the same work breaks, lunch periods, and locker room with unit employees, punched a timeclock, received similar benefits, and had similar training. In *Blue Grass Industries*, 287 NLRB 274, 276-277 (1987), decided after *Penn Color*, the Board found that the circumstances compelled the inclusion of quality control inspectors in the unit of production employees. The Board found that their jobs were a vital part of the production plant, their pay and benefits were similar, and that there was significant interaction between the two groups of employees.

[10] See *Blue Grass Industries*, supra; *W. R. Grace & Co.*, supra. In *Blue Grass*, the administrative law judge noted that "[a]lthough the important criterion is community of interest with bargaining

present that would support adding the disputed employees to the petitioner-for unit, i.e., they perform production-related functions, have some contact with unit employees, have similar benefits and holidays, are not required to have special education or training, and some were formerly employed in production positions. Consequently, a unit including these employees might also have been an appropriate unit had such a unit been sought by the Petitioners. However, because, as previously stated, the disputed employees have separate supervision, are paid differently, do not interchange with the production and maintenance employees, have generally different functions, and have insubstantial and irregular contact with the requested production and maintenance employees, and as no labor organization is seeking to represent a broader unit including the disputed employees, we conclude that the quality assurance/lab technicians, temporary management trainees I, and lab technicians do not share such an overwhelming community of interest as to require their inclusion in the petitioned-for production and maintenance unit. *Penn Color*, supra.[11]

unit members rather than the relationship of the job to the production process . . . the importance of quality control jobs in the production of garments is a further consideration when a community of interest has already been demonstrated." 287 NLRB at 299.

[11] By stating that we made our decision "in large part because the Petitioner does not seek to represent [the disputed employees]," our dissenting colleague is implying that we have given "controlling" weight to the Union's extent of organization, which is prohibited by Sec. 9(c)(5) of the Act. However, as is clear from the above, "the appropriateness of the proposed unit . . . is indicated by other clear and decisive factors, [and] there is no reason why the Union's decision to seek representation of employees on a narrower basis[] should preclude the Board from finding the smaller unit appropriate." *E. H. Koester Bakery Co.*, supra at 1012 fn. 16 (internal quotation marks omitted).

Industrial Engineer and Industrial Engineer Trainees

The Employer's one industrial engineer and two industrial engineer trainees (collectively referred to as industrial engineers) do timestudies. In performing their timestudies, industrial engineers observe production employees, record the time it takes them to perform production functions, and make calculations to obtain standards for classification and products. They also prepare layouts for new departments and/or new functions. While on the production floor, industrial engineers speak with production employees inquiring about any changes in their jobs since the prior audit, and eliciting any recommendations regarding the flow of the jobs. Industrial engineers spend half of their time in their office, located away from the production floor, and the other half in and around the production areas obtaining data. Although the data they generate affects the amount of wages and incentive pay received by production employees, industrial engineers make no recommendations regarding whether the standards calculated should result in a pay increase or incentive pay.

Industrial engineers are under the supervision of the senior and chief industrial engineers, who in turn report to the director of research and development. None of these three supervisors or managers supervise any production and maintenance employees. There are no education or technical prerequisites for becoming an industrial engineer; they are not required to possess any college education, and, at most, are required to take a few weeks of on-the-job training and pass a "common sense" test. They are compensated differently from production and maintenance employees.[12] There is no interchange be-

[12] One trainee testified that he had been earning $7.66 per hour as a production employee in the bacon department. On becoming an industrial engineer, he earned $375 per week but no longer received overtime.

tween them and production and maintenance employees. Two industrial engineers were temporarily assigned to perform production tasks in a newly created production area until the Employer placed production employees in that area. These duties encompassed approximately 2 hours per week for 2 months. They also performed "leaker" checks on an as-needed basis, identical to those performed by production employees. Of the three industrial engineers employed at the time of the hearing, two had transferred from production and maintenance positions.

The Board has consistently found that timestudy employees are not supervisory, managerial, or confidential employees.[13] Timestudy employees are often excluded from production and maintenance units by the parties,[14] or found to be technical employees and either excluded from production and maintenance units under *Sheffield Corp.*[15] or included in a separate technical unit with other technical employees,[16] or given a separate unit.[17]

[13] See, *e.g.*, *Case Corp.*, 304 NLRB 939 (1991). In the instant case, no party argues that industrial engineers should be excluded because they are supervisory, managerial, or confidential employees.

[14] See, e.g., *Van Gorp Corp.*, 240 NLRB 615 (1979); *United Technologies Corp.*, 274 NLRB 504 (1985).

[15] 134 NLRB 1101 (1961). See also *Reliable Castings*, 236 NLRB 315 (1978).

[16] See, e.g., *Chrysler Corp.*, 192 NLRB 1208 (1971).

[17] *Case Corp.*, supra; *Ford Motor Co.*, 66 NLRB 1317 (1946). Joint Petitioners assert that industrial engineers should be excluded because, inter alia, they are technical employees. Joint Petitioners claim that they have special skills, make determinations that directly affect production and maintenance employees' compensation, use independent judgment, are paid differently, and are separately supervised. Contrary to the Joint Petitioners, we find that industrial engineers are not technical employees. There is no evidence of any special requirements for becoming an industrial engineer, they receive minimal on-the-job training, and

In the instant case, we find, contrary to the Regional Director, that industrial engineers do not share a sufficiently strong community of interest with production and maintenance employees such that their inclusion in the petitioned-for unit is mandated. Indeed, the interests of the industrial engineers are separate and distinct from the interests of the production and maintenance employees.[18] Industrial engineers are separately supervised; spend half of their time in their office, which is located away from the production floor; do not interchange with production and maintenance employees; and they are differently compensated. Further, industrial engineers primarily perform different functions from those performed by production and maintenance employees, even though their functions are related to the production process in that they ensure that the Employer's operations are carried out with maximum efficiency and at minimum cost. The occasional production tasks that industrial engineers may perform are only incidental to their primary function of calculating production standards, and there is no evidence that production employees ever perform the industrial engineers' functions. Moreover, although they have some contact with production and maintenance employees, this contact is limited to occasional questions about the workflow and does not justify their inclusion in the unit.

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they do not appear to exercise independent judgment and discretion. Thus, we do not exclude the industrial engineers on that basis. Compare *Reliable Castings*, 236 NLRB 315 (1978). There, the Board found that timestudy employees were technical employees based on their special skills, their exercise of independent judgment, and their special education and training.

[18] Cf. *University of Hartford*, 295 NLRB 797 (1989). There, it was noted that in *Georgetown University*, 200 NLRB 215 (1972), the Board drew an analogy between such a "blue collar" unit in a university setting and the usual production and maintenance unit in the industrial areas, noting that such a unit normally does not include office clerical or technical employees with manual workers. 295 NLRB at 798 fn. 5.

As is the case with respect to the quality assurance/lab technicians, there are some factors here which would support finding appropriate a production and maintenance unit including industrial engineers, should the Joint Petitioners have sought such a unit. Thus, industrial engineers perform production-related functions, have some contact with production and maintenance employees, share the same benefits and holidays, receive on-the-job training, and are subject to the same personnel rules. As noted above, however, the petitioned-for unit need only be an appropriate unit, and in this case there is no labor organization seeking to represent a broader unit including industrial engineers. We conclude that industrial engineers do not share such a close community of interest with the petitioned-for production and maintenance employees as to require their inclusion in the unit. See *Penn Color*, supra.

In summary, we reverse the Regional Director's supplemental decision with respect to his finding that the petitioned-for unit must also include quality assurance/lab technicians, temporary management trainees I, lab technicians, and industrial engineers, and we sustain the challenges to those employees' ballots. We deny the Joint Petitioners' request for review with respect to the inclusion of the waste management operator. Finally, we find it unnecessary to consider the Joint Petitioners' request for review with respect to the receiver's alleged status as a guard. In light of our Decision sustaining the challenges to the ballots of the disputed employees listed above, we find it unnecessary to resolve the challenge to the receiver's ballot as his vote is not determinative of the election results.

ORDER

The Employer's request for review and motion to strike are denied. The Joint Petitioners' request for review is granted with respect to the Regional Director's finding that quality assurance/lab technicians, management trainees I, lab technicians, and industrial engineers must

be included in the petitioned-for-unit, his decision as to those employees is reversed, and the challenges to their ballots are sustained. In all other respects, the Joint Petitioners' request for review is denied, except that the challenge to the ballot cast by the receiver shall remain unresolved, as it is not determinative of the election results.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the Joint Petitioners, United Food and Commercial Workers Union, Local 204, AFL-CIO, and International Union of Operating Engineers, Local 465, AFL-CIO, and that the Joint Petitioners are the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, janitorial employees, condensate drivers, waste management operators, raw material handler/cleaners, stockers, emergency room technicians, first aid attendants, kill gang leaders, and plant clericals, including inventory control section leaders, office clerks B & C (inventory control), distribution service section leaders, office supplies section leaders, and office clerks A, B & C (supplies/distribution) employed by the Employer at its Clinton, North Carolina facility, but excluding long-haul drivers, co-drivers, short-haul drivers, sales route drivers, permanent livestock drivers, temporary livestock drivers, outside buyers, hog buyers, assistant hog buyers, assistant hog buyers p.m., tire changers, vehicle mechanics, vehicle refrigeration mechanics, laborers (garage a.m. and p.m.), industrial engineers, industrial engineer trainees, laboratory technicians, quality assurance technicians, temporary management trainees I, process sales coordinators, trip audit entry section

> leaders, office clericals, confidential employees, guards, and supervisors as defined in the Act.[19]

MEMBER STEPHENS, dissenting.

Contrary to the majority, I would affirm the Regional Director's determination that the Petitioners' challenges to the ballots of the quality assurance/lab technicians and lab technicians (QALTs) and the industrial engineer and industrial engineer trainees (IEs) should be overruled. The Board has routinely included quality control employees in production units when a community of interest between the two groups has been shown to exist. *Blue Grass Industries*, 287 NLRB 274, 299 (1987); *Owens-Illinois, Inc.*, 211 NLRB 939, 941 (1974); *W. R. Grace & Co.*, 202 NLRB 788, 789 (1973). This is particularly true where it has been established that quality control employees perform functions that are integral to the production process in addition to sharing a community of interest with the production employees. Moreover, the Board has included such employees in the unit on the basis of their community of interest without regard to the petitioning labor organization's desire to exclude them. *W. R. Grace & Co.*, supra. See also *Blue Grass Industries*, supra (quality control employees included in the production and maintenance unit contrary to the General Counsel's position; unclear which party challenged their ballots). Cf. *Beatrice Foods*, 222 NLRB 883 fn. 3 (1976) (challenges to ballots of quality control employees sustained in view of lack of community of interest; unclear which party challenged their ballots).

In the instant case, the majority concedes that the QALTs share a community of interest with other employees in the production unit. Moreover, it is a given that the QALTs, who spend 80 percent of their time on

[19] The receiver is neither included in nor excluded from the bargaining unit covered by the certification issued herein, inasmuch as we have not determined his alleged guard status.

the production floor, perform an integral function in the meat processing and packing operation. Notwithstanding the foregoing, the majority sustains the challenges to the QALTs' ballots in large part because the Petitioners do not seek to represent them. The majority takes the position that the QALTs can be included, over the Petitioners' objection, only when they have an "overwhelming" community of interest with the other unit employees. The only case cited for this proposition is *Penn Color*, 249 NLRB 1117 (1980) and that case does not set forth so stringent a test.

In sum, my colleagues disregard the precedent cited above and derogate the Board's policy against fragmenting production and maintenance units.

Similarly, a community of interest has been shown to exist between the IEs and the production unit employees. IEs spend 50 percent of their time on the plant floor and perform some unit work in addition to having the same holidays and benefits. For the reasons set forth by the Regional Director, I would include them in the unit as well.

APPENDIX K

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 12-RC-7606

THE LUNDY PACKING COMPANY, INC.
Employer

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO
Joint-Petitioners

ORDER

Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election raises a substantial issue solely with respect to the eligibility of Darrell Coleman, who is employed as an Electrician A at the Employer's Gold Banner facility; and the unit placement of the industrial engineer and industrial engineer trainees, and laboratory technicians, quality assurance/laboratory technicians, and temporary management trainees I. The Board concludes, however, that these issues may best be resolved through the challenged procedure. Accordingly, the Decision is amended to permit the above-listed employees to vote by challenged ballot, and the Employer's Request for Review is denied in this and all other respects. The Employer's Motion to Stay the Election is denied. Joint Petitioners' Request for Review of the Acting Regional Director's Decision and Direction of

Election raises a substantial issue solely with respect to whether the single employee classified as a "receiver" is a guard within the meaning of Section 2(3) of the Act. The Board concludes, however, that this issue also may best be resolved through the challenge procedure. Accordingly, the Decision is amended to permit the Receiver to vote by challenged ballot, and the Joint Petitioners' Request for Review is denied in this and all other respects.

JAMES M. STEPHENS, Chairman
DENNIS M. DEVANEY, Member

Member Raudabaugh, dissenting in part:

I would grant the Employer's Request for Review with respect to the sufficiency of the Joint Petitioners' showing of interest, including particularly the issue of whether *St. Louis Independent Packing Co.*, 169 NLRB 1106, 1107 (1969), was correctly decided.

JOHN NEIL RAUDABAUGH, Member

Dated, Washington, D.C., June 3, 1993.

APPENDIX L

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

March 25, 1996

Mr. Laurence Gold
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, DC 20006

Re: United Food and Commercial Workers Union, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO v. Lundy Packing Company, et al. Application No. A-792

Dear Mr. Gold:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on March 25, 1996, extended the time to and including May 1, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ Jeffrey D. Atkins
JEFFREY D. ATKINS
Assistant Clerk